Office-Supreme Court, U.S.
FILED
APR 6 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 4

JIM GARRISON,

Appellant

versus

STATE OF LOUISIANA,

Appellee

On Appeal from the Supreme Court of Louisiana

SUPPLEMENTAL BRIEF FOR APPELLANT

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No. 400

JIM GARRISON,

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SUPPLEMENTAL BRIEF FOR APPELLANT

In its opinion rendered on March 9, in *New York Times Co. vs Sullivan,* this Court held that the First and Fourteenth Amendments require "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not".

Most of the issues in the case at bar have now been determined in this Court's opinion in the *New York Times* case. Thus, it was held in that opinion, that this Court's prior statements (in *Beauharnais vs Illinois*

and other cases) "to the effect that the Constitution does not protect libelous publications", do not foreclose inquiry into cases which might involve "the use of libel laws to impose sanctions upon expressions critical of the official conduct of public officials", and that, like "the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations", but must also "be measured by standards that satisfy the First Amendment".

Similarly, this Court has now held, in its opinion in the *Times* case, that "authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth, whether administered by judges, juries or administrative officials . . . that erroneous statement is inevitable in free debate", and that, accordingly, a "state rule of law is not saved by its allowance of the defense of truth".

In the same vein, the Court also held in the *Times* case, that "just as factual error affords no warrant for repressing speech that would otherwise be free, the same is true of injury to official reputation"; and criticism of "official conduct (of government officers) does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations".

The Court expressly re-affirmed its prior holdings that this rule is especially applicable to judges, who "are to be treated as 'men of fortitude, able to thrive

in a hardy climate' ", in its holding "that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge . . . . even though the utterance contains 'half-truths' and 'misinformation' ", since "such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice".

Finally, this Court held also, in the *New York Times* case, that while the question as to the constitutionality of the Sedition Act of 1798 (which prescribed punishment for "false, scandalous and malicious" criticism of government officers) was never brought before this Court, "the attack upon its validity has carried the day in the court of history" which reflects "a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment"--now equally as applicable to state as to federal laws.

It remains only to add a brief comment as to the Court's holding that damages may be awarded for a defamatory statement regarding a government officer's official conduct only on proof that the statement was made with actual malice--with knowledge that it was false, or with reckless disregard of whether it was false or not.

It seems obvious from its opinion in the *New York Times* case, that this Court did not mean to retrogress by enunciating the actual-malice rule as a substitute for the stricter clear-and-present-danger test in criminal prosecutions for communication of ideas, although

logic may now require that the actual-malice rule be added to the requirements of proof of clear and present danger, and of trial by jury, as an additional safeguard in criminal libel cases.

If no clear and present danger appears as to an interest which the State may legitimately protect by suppressing speech, there is no more constitutional basis for deprivation by the State, of the benefit of speech on the ground that it may have been malicious, than on the ground that it may have been false.[1] Appellant's original brief demonstrates (pages 43-47) that the danger of permitting punishment of unpopular speech is just as great under the guise of punishing improper motives, as under the guise of punishing factual error.

This Court reversed the contempt conviction in *Pennekamp vs Florida*, 328 US 331, 345 (1946), on the ground that no clear and present danger had been shown, despite its acceptance *arguendo* of the State Courts' findings "that the truth was willfully or wantonly or recklessly withheld from the public or that the motive behind the publication was to abase and destroy the efficiency of the courts"; and in none of this Court's decisions in criminal cases, invalidating breach-of-the-peace or other convictions on clear-and-present-danger grounds, has it given any consideration to malice as a determinative factor.

[1] "The people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these (First Amendment) liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell vs Connecticut*, 310 US 296, 310 (1940).

At all events, while the State of Louisiana undertook to establish malice in the case at bar, and the trial court found malice, there was neither proof nor finding of "actual malice" in the sense of knowing falsity or reckless disregard for the truth.

The court's finding of malice, based exclusively on "statements made (by appellant) upon other occasions". (R 628), was nothing more than a finding of animosity on his part toward the Judges. The trial court expressly attributed appellant's "malice" to "either anger, provocation, ill feeling, spite or enmity, by the requirement of the judges in requiring the five signatures for the approval of his motions for expenditures" (R 631).[2]

In fact, the trial court's own finding in this regard was phrased in terms of inference rather than of proof: "After considering all of the evidence in this case, I can only conclude that the Defendant could not have reasonably had any honest or reasonable belief as to the truth of this statement. It is inconceivable to me that the Defendant could have had a reasonable belief, which could be defined as an honest belief, that not one but all eight of these Judges of the Criminal District Court were guilty of what he charged them with in the defamatory statement" (R 632).

This Court will itself always "make an independent examination of the whole record", and will itself

[2] The trial judge had himself held (R 622) "that the District Attorney could be provoked by the establishment of such a rule, as the statute did not require five of the Judges to sign the order . . . I do not believe that the Legislature contemplated this . . . The Act only provides that it is necessary to have the signature of one judge."

examine "the statements in issue and the circumstances under which they were made", in order to determine "whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect", and will itself too, "in proper cases review the evidence to make certain that those principles have been constitutionally applied". *New York Times Co. vs Sullivan.*

So far from showing "actual malice" on the part of appellant, in the sense of knowledge of the falsity of his statement or reckless disregard as to whether it was false; the evidence, as the following brief discussion thereof demonstrates, shows even an absence of personal animosity on his part toward the Judges.

Some hundred pages of the transcript (R 196-282) cover the portion of the record of the trial devoted to evidence of, and with reference to, statements by, appellant, admitted by the trial judge over objection, as bearing on appellant's "malice" at the time of the utterance in issue. Much of this evidence dealt with appellant's vocal efforts directed toward bringing to public attention, the crowded condition of the court's criminal docket, attributed by appellant to the Judges' neglect of duty and excessive vacations.[3]

[3] It was shown that one of the judges had tried no cases at all for some years (R 225, 239); that none of the judges ordinarily tried cases after noon (R 206, 226, 239); that one of the judges did not (R 225, 228), and in fact refused to (R 240 et seq.), hold court on Fridays; and that, in an address delivered at a church a month after making the statement in issue, appellant had said: "I pointed out that these holidays on Fridays, which has been the custom, just can't continue with the Parish Prison crowded as it is. The two and one-half months vacation(s) are not reasonable. . . . The summer vacation of two and one-half months originated

One reporter, for instance, quoted appellant as having "said that the Judges should be investigated too for taking 206 days of vacation a year before the legal holidays . . . that for every trial date, I believe, there were two vacation dates . . . he called it a racket . . .", and insisted "'that the only way to get these sacred cows back to work is by public reaction'" (R 277-278).[4]

In one especially interesting instance, a statement made by appellant to a reporter more than two months before the assertedly defamatory one at issue, was sought to be introduced in evidence by the prosecution. The trial judge overruled a defense objection, and ruled that "for the purpose of showing malice and for that purpose alone, the Court will allow it to go in" (R 231). But then, when the statement (R 233) was read, it disclosed no malice whatever on appellant's part, whereupon the trial judge reversed himself:

> "At this time, the Court will not permit it to be made a part of the record for the reason that the Court is allowing these statements made upon other occasions, both before and after the alleged defamatory statements, for the sole purpose of showing malice. The state-

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in 1921 because the courtrooms were so hot without the appliances we have today but now they have air-conditioning in the courtrooms but, unfortunately, the courtrooms are empty and the Parish Prison is jammed all summer long where it is hot. I feel I would not be doing my duty if I did not point it out in positive terms. Whether it is good taste or not is irrelevant. The point is that the Parish Prison is crowded and they have too many holidays" (R 254).

[4] This witness even stated that appellant "certainly didn't give me the appearance that he was being vindictive" and agreed "that at no time did Mr. Garrison show any personal animosity toward the judges" (R 278).

> ment offered does not show a malicious intent, but rather an intent of co-operation ." (R 234).[5]

In another instance, when a reporter, appearing for the prosecution, was permitted, over defense objection, to repeat something which appellant had said more than two months after having made the statement in issue, the witness testified that

> ". . . he said that a number of my lawyer friends told me that what I said about the judges was true but that I shouldn't have said it. He also said that if he were to make the criticisms that were involved in the charges against him, over again, he might word them differently, but he didn't know what wording would be better. He also said that, whatever the outcome was, he would never apologize for telling the people of New Orleans the truth . . ." (R 271).

Thereupon the prosecution announced that the "State is taken by surprise", and sought to cross-examine its witness as to portions of his testimony, but the Court ruled: "He has testified to that. Mr. Grémillion, you couldn't be caught by surprise": and the testimony was permitted to stand (R 271).

In still another instance, a reporter testifying as a prosecution witness, was asked on cross-examination,

[5] After considerable colloquy, the statement was placed in the record by agreement (R 235).

whether he had not, "many, many times", heard one of the judges "use very vituperative language about the District Attorney", to which the witness replied (R 244):

> "Yes, sir, and by the same token I have sat in Mr. Garrison's office and heard him blast the judges, so it is a sort of a tie, it's a stand-off."[6]

* * * * *

> "Q. During the course of these exchanges, then one day the District Attorney was charged?
> "A. Yes, sir."

In the last analysis, the absence of any such "actual malice" on appellant's part, as this Court said in the *Times* case might conceivably have deprived such a statement of its constitutional protection in a civil action, must really be clear from the trial judge's own final conclusion, in the imposition of sentence, "that the defamatory statement might not have been issued without some provocation" (R 638).

It is respectfully submitted that the points made in appellant's original brief herein, many of which have now been adopted in this Court's opinion in *New York*

[6] The bill of information itself, filed by the Attorney General to charge appellant with defamation in the case at bar, quotes the newspaper article of which complaint is made as giving "the statement by District Attorney Jim Garrison on his feud with the criminal district court judges" (R 27).

Times Co. vs Sullivan, impel reversal of the judgment of the Supreme Court of Louisiana in the case at bar.

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April, 1964.